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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

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No. 80-5006

HUEY EDWARD COON,

Petitioner

V.

STATE OF ALABAMA,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent, State of Alabama, respectfully requests that this Court grant the Petition for Writ of Certiorari insofar as it raises the issue concerning the preclusion of lesser included offenses, which was involved in Beck v. Alabama, 437 U.S. ___, 48 U.S.L.W. 4801 (June 20, 1980), vacate the judgment below, and remand the case to the Alabama Supreme Court for further consideration in light of the Beck decision. In the alternative, respondent respectfully requests that the petition be denied insofar as it raises issues not related to Beck v. Alabama, supra, and that the remainder of the petition be granted with full briefing and argument ordered on the issue of whether the present case is distinguishable from the Beck case.

QUESTIONS PRESENTED

1. Should the judgment of a state appellate court be vacated and the case remanded for further consideration in light of an intervening decision of this Court when the intervening decision raises state law questions which may avoid the federal issues entirely, and when the federal issues should not be summarily decided?

2. Is the present case, in which there was no evidentiary basis at trial for non-capital lesser included offense instructions, distinguishable from Beck v. Alabama, 437 U.S. ___, 48 U.S.L.W. 4801 (June 20, 1980)?

3. Should a petition for certiorari be denied as to federal issues which were not presented to or addressed by the state appellate courts below?

STATEMENT OF THE CASE

Petitioner, Huey Edward Coon, was indicted by the Grand Jury of Covington County, Alabama, during its September 1978, term, under a four court indictment charging him with the offense of robbery, during which, the victim was intentionally killed. (R. 799). Several pretrial motions filed by petitioner were denied, overruled or otherwise disposed of by the trial court. (R. 8-10, 16, 20, 32, 812).

Trial of this matter occurred during the period of October 9-12, 1978 (R. 916), before a duly qualified and struck jury. (R. 36-82). The evidence presented at the trial was conclusive of petitioner's guilt.

John Ezra Brown was employed at the Zippy-Mart Store on East Three Notch Street, in Andalusia, Alabama, as a clerk-manager. In the early morning hours of August 29, 1978, he was stabbed with a knife and beaten with a blunt instrument, apparently a metal milk crate, while at work in the store. He died a short time later that same morning at a local hopsital. (R. 141). Death was due to massive, multiple skull fractures, massive bleeding within the cranial bowl itself as a result of multiple blows to the head of considerable force. (R. 236-237).

Officer Tarris Wood remembered seeing the petitioner, Charlie Jenkins and Ernest Marvin shortly

before the robbery and intentional killing of Mr. Brown. (R. 324-325). They were getting into a car, and Jenkins said that he was going to the Zippy Mart to get a six-pack of beer. (R. 326). The three men were subsequently apprehended, before daybreak that same morning. (R. 332-338). Eleven cans of Budweiser beer were seized at Charlie Jenkins' house, when he was apprehended. (R. 335).

Sergeant Marlon Brewer, Criminal Investigator with the Alabama Bureau of Investigation, Department of Public Safety, began working on the case on the morning of August 30, 1978. (R. 484). Petitioner, Huey Coon, was brought to his office around 9:30 a.m., at which time, petitioner made an oral statement, in the presence of Lt. Glass, Howard Easley and Jim Stallings, and after signing a Miranda waiver. (R. 484-488). The substance of this statement was an admission by petitioner that he was at the Zippy Mart with Jenkins and Marvin when Mr. Brown was hit, but he denied any participation in the robbery-intentional killing of Mr. Brown. (R. 489-890). That afternoon, petitioner made another voluntary statement to Sgt. Brewer, with Investigator Jim Stallings present, and subsequent to his being informed of his Miranda rights. (R. 493). This statement was essentially the same as the first one, but with more details. (R. 494). Said statement was reduced to writing and admitted into evidence as State's Exhibit 43. (R. 494, 498).

Petitioner gave a third statement on September 5, 1978, to Sgt. Brewer and Jim Stallings. (R. 499) Again, he was informed of his Miranda rights, but he wanted to talk, understanding those rights fully. (R.

500). Furthermore, petitioner showed the officers where he had hidden the knife, burned his clothing worn that night, and thrown the tennis shoes he had on. (R. 505-508). These items and remnants of these items were found just where Coon said he had put them. (R. 505-508). At this time, petitioner admitted to Sgt. Brewer that he killed Mr. Brown. (R. 509). He said, "well, the cash register came open and he seen the money, and something just told him to jump on that old man." (R. 510). Petitioner even took the stand, outside the presence of the jury, as to the question of the voluntariness of his statements. (R. 549-568). He stated that he voluntarily gave those statements, and submitted, with his consent, to hypnosis. (R. 552, 556, 565). Coon's taped statement of September 5, 1978, revealed the following:

a). Petitioner grabbed Mr. Brown around the neck, threw him on the floor and stabbed him with a knife; (R. 610).

b). The knife broke, so he picked up a metal milk crate and struck Mr. Brown in the head repeatedly with it; (R. 611).

c). Petitioner told "Duck" to get the money out of the cash register; (R. 611).

d). Petitioner took Mr. Brown's wallet, two magazines from the rack, and two six-packs of Budweiser beer before leaving the store; (R. 612).

e). The money was split back at the house; (R. 612).

f). The three men discussed the lie they would tell police, if questioned; (R. 613).

g). Petitioner had to change clothes because those he was wearing had blood on them; (R. 613).

h). Petitioner related disposing of the

magazines, clothes, tennis shoes, broken knife and hiding the money; (R. 616).

i). He did not know why he robbed and killed Mr. Brown, it just happened. (R. 617).

Sgt. Brewer then stated that petitioner was hypnotized, with petitioner's consent, but that he told essentially the same story as in State's Exhibit 43. (R. 648-654).

Edith Anderson, Charlie Jenkins' sister and at whose house he resided, testified that petitioner did come there, after Charlie had been arrested, to get his clothes and two magazines. (R. 364-366). Later, she found a brown wallet in a chest of drawers in Charlie Jenkins' room, which was given to police by her husband. (R. 371-375). The wallet contained various identification cards bearing the name John E. Brown or John Ezra Brown, said wallet being identified by Brown's widow as having belonged to her late husband. (R. 301, 687-688).

Lieutenant Charlie Glass testified that burnt clothing, two magazines and a broken knife blade had been found in the alley petitioner had shown them. The two magazines were "Club" and "High Society", and three other stores in Andalusia sold "Club", but only the Zippy Mart sold "High Society". (R. 304).

The supervisor for Zippy Mart in the area, James McCurley, testified that he viewed 11 cans of Budweiser beer at the police station, and recognized the price tag as being Zippy Mart's. (R. 175-177).

Mr. Brown's injuries consisted of hematoma of both sides of the head, numerous fractures of the skull, with blood and brain tissue extruding from the fractures, and fractures to the right hand. (R. 135-143). An inventory revealed that the store was short of $190.34. (R. 184).

Having heard the evidence, the jury deliberated and returned a guilty verdict fixing the punishment at death. (R. 785). On November 15, 1978, the trial court held a hearing for consideration of any aggravating or mitigating circumstances. (R. 788-791, 916). The trial court took the matter under advisement and, on November 20, 1978, having found that the aggravating circumstances outweighed the non-existent mitigating circumstances, sentenced Huey Coon to death in the electric chair. (R. 792-796, 917).

Petitioner filed a motion for new trial (R. 903-929), and the same was overruled and denied by the trial court on January 30, 1979 (R. 932-933), after a hearing held on January 29, 1979 (R. 796a-796b).

The conviction and sentence, being subject to automatic appeal, was appealed and affirmed by the Alabama Court of Criminal Appeals on September 4, 1979. Application for Rehearing, having been filed on September 18, 1979, was overruled on October 2, 1979.

The Supreme Court of Alabama granted petitioner's writ of certiorari on November 20, 1979, and on February 8, 1980, the conviction was affirmed. Application for Rehearing was not timely filed. The Court ordered, on March 6, 1980, that petitioner's execution be carried out on June 13, 1980. A motion for stay of execution was denied by the Court on June 6, 1980.

Justice Powell of this Honorable Court, on April 25, 1980, granted petitioner an extension of time until July 7, 1980, in which to file a petition for writ of certiorari. A stay of execution was granted by Justice Powell on June 12, 1980.

Petitioner's Petition for Writ of Certiorari, having been filed and docketed in the Supreme Court of the United States on July 3, 1980, was received in the Office of the Alabama Attorney General on July 14, 1980.

Hence, this brief in opposition to the petition for writ of certiorari was prepared.

HOW THE FEDERAL CONSTITUTIONAL ISSUES WERE TREATED BELOW

Petitioner raised the issue concerning the preclusion of lesser included non-capital offenses at trial, and in the Alabama appellate courts. Both the Alabama Court of Criminal Appeals and the Alabama Supreme Court rejected his arguments that the preclusion of lesser included offenses violated the Eighth and Fourteenth Amendments.

Neither the Alabama Court of Criminal Appeals nor the Alabama Supreme Court had any opportunity to consider petitioner's arguments that the application of the Code of Alabama 1975, § 13-11-6(4) and § 13-11-6(8) sentencing provisions in this case was unconstitutional, because petitioner did not raise those issues in the trial court, or in the Alabama Court of Criminal Appeals, or in the Alabama Supreme Court. The first time petitioner even mentioned those two statutory sentencing provisions was in his petition for certiorari to this Court.

REASONS WHY THE WRIT SHOULD BE GRANTED, THE JUDGMENT BELOW VACATED, AND THE CASE REMANDED TO THE ALABAMA SUPREME COURT FOR FURTHER CONSIDERATION IN LIGHT OF BECK V. ALABAMA

1. The Intervening Decision in Beck v. Alabama, 437 U.S. ____, 48 U.S.L.W. 4801 (June 20, 1980), Makes it Proper to Vacate and Remand for Further Consideration.

The Alabama Supreme Court's decision affirming petitioner's conviction and sentence of death was issued on February 8, 1980, which was four-and-a-half months before this Court's decision in Beck v. Alabama, 437 U.S. ___, 48 U.S.L.W. 4801 (June 20, 1980). This Court has long recognized that the proper practice in such cases is to vacate the state appellate court judgment and remand for further consideration in light of the intervening decision of this Court. E.g., Harlin v. Missouri, 439 U.S. 459 (1979); Heller v. New York, 413 U.S. 483, 494 (1973);

Berger v. California, 393 U.S. 314 (1969).

At the time the Beck case was decided, there were nine other Alabama capital punishment cases pending before this Court on petitions for writs of certiorari to the Alabama Supreme Court. The respondent, State of Alabama, sent a letter dated June 23, 1980, requesting that this Court not reverse the judgments in those nine other cases but instead remand them to the Alabama Supreme Court for further consideration in light of the Beck decision. On June 30, 1980, this Court entered orders vacating and remanding instead of reversing those nine cases. They are: Williamson v. Alabama, No. 79-5026; Wilson v. Alabama, No. 79-5301; Horsley v. Alabama, No. 79-5458; Cade v. Alabama, No. 79-5525; Baldwin v. Alabama, No. 79-5563; Thomas v. Alabama, No. 79-5709; Ritter v. Alabama, No. 79-5741; Mack v. Alabama, No. 79-5835; and Crawford v. Alabama, No. 79-6190. This Court should take the same action in the present case.

2. Reconsideration by the Alabama Supreme Court is Particularly Appropriate, Because State Law Issues Raised in the Wake of the Beck Decision May be Determinative.

This Court's decision in Beck v. Alabama, supra, holding the preclusion clause of Alabama's capital punishment statute unconstitutional as it applied in that case raises a serious and difficult question of whether that clause is severable from the remainder of the statute. Severability is a state law question which should be decided by the Alabama Supreme Court. E.g., Morey v. Doud, 354 U.S. 457, 470 n. 16 (1957); Dorchy v. Kansas, 264 U.S. 286, 290 (1924).

If the Alabama Supreme Court decides as a matter of state law that the preclusion clause is not severable and that the entire statute is due to be invalidated, then petitioner's conviction and sentence will be invalid as a matter of state law and there will be no necessity for further

inquiry into any federal constitutional issues. Accordingly, there is no present necessity for this Court to address the federal constitutional issue of whether this case is distinguishable from Beck, because that issue may be rendered moot by the Alabama Supreme Court's decision on severability. Cf., Bellotti v. Baird, 428 U.S. 132, 147 (1976) (abstention is appropriate where answers to state law questions "might avoid in whole or part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem").

Another state law question which should be answered before the federal constitutional issues are addressed concerns what, if any, lesser included offenses are definitionally possible as a matter of state law when a defendant like petitioner is charged with the Code of Alabama 1975, § 13-11-2(a)(2) capital offense of robbery during which the defendant was intentionally killed. While the petitioner in Beck was also convicted of violating § 13-11-2(a)(2), he was not charged with and convicted of robbery-intentional killing, but instead he was charged with and convicted of robbery-murder. The difference is that the indictment in Beck gratuitously averred that the intentional killing was done "with malice aforethought," an averment of first degree murder. See, Respondent's Brief on the Merits, Beck v. Alabama, O. T. 1979, No. 78-6621, page 3 n. 2. The Alabama Supreme Court has held that while such an additional averment is not required, if the State makes the additional averment that the victim was murdered in the first degree instead of simply intentionally killed, then the State must prove murder in the first degree. E.g., Clements v. State, 370 So.2d 723, 725 (Ala. 1979); Jacobs (John L.) v. State, 371 So.2d 448, 449 (Ala. 1979).

Since the State in Beck gratuitously averred murder in the first degree instead of intentional killing, it was clear as a matter of state law that murder was a lesser

included offense as was robbery, and the State conceded that point. Beck v. Alabama, 48 U.S.L.W. at 4802 & n. 5. But in the present case it is not clear what the lesser included offenses, if any, are because the indictment did not gratuitously aver that the intentional killing was done "with malice aforethought." (R. 799) Certainly, "intentional killing" is not a lesser included offense, because no such crime is defined and punished anywhere in Alabama's statutes. "Intentional killing" exists only as a component part or element of robbery-intentional killing, a capital offense. The Alabama Supreme Court has not yet decided what lesser included offenses exist in a robbery-intentional killing capital case, because that issue never arose prior to Beck.

In the words of Bellotti v. Baird, 428 U.S. 132, 148 (1976), until the Alabama Supreme Court decides the state law issues raised in the wake of the Beck decision, "it is impossible to define precisely the constitutional question presented" in this case. The Alabama Supreme Court can decide the state law issues and thereby define precisely the federal constitutional questions presented, or perhaps even avoid altogether the necessity for federal constitutional adjudication, if this case is remanded for further consideration in light of Beck. Such a remand is especially desirable since the merits of the federal constitutional issue which may be presented by this case should not be summarily decided.

3. The Merits of the Federal Constitutional Issues Presented by this Case Should Not Be Summarily Decided.

The present case is materially different from the Beck case and that difference alters the federal constitutional issues sufficiently enough to require full briefing and argument before any decision on the merits. The crucial difference between this case and the Beck case is that in the present case there was no basis in the evidence at trial for any lesser included offense instruction. The grant of certiorari in Beck was limited to the following question:

> May a sentence of death constitutionally be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict? 48 U.S.L.W. 4801 (Emphasis added).

Because there was a conflict in the evidence about Beck's intent to kill, which is a necessary element of the capital offense but not of the lesser included non-capital offenses of robbery and felony murder, which were encompassed by the indictment in that case, the State conceded in Beck that there was a factual basis for a lesser offense verdict under state law. 48 U.S.L.W. at 4802 & n. 5. The State conceded that the jury in that case would have been instructed on two lesser included offenses had it not been for the preclusion clause. Id. The present case is different.

In the present case, as a matter of state law the petitioner was either guilty of the Code of Alabama 1975, § 13-11-2(a)(2) capital offense of robbery during which he intentionally killed the victim, or he was guilty of nothing at all. There was no evidence placing into dispute the petitioner's intent to kill, and petitioner's confession admitting the intentional killing was admitted into evidence. (R. 512, 607).

That factual distinction between the present case and Beck mandates a different holding in the two cases. Not only did this Court expressly limit its holding in Beck to cases in which there was an evidentiary basis at trial for lesser included offenses, Beck v. Alabama, supra, 48 U.S.L.W. 4801 ("We now hold that the death penalty may not be imposed under these circumstances."), but all of the precedents relied upon in that decision are similarly limited. E.g., Keeble v. United States, 412 U.S. 205, 208 (1973) ("if the evidence would permit a jury to rationally find him guilty of the lesser offense and acquit him of the greater"), quoted on 48 U.S.L.W. at 4803; Berra v. United States, 351 U.S. 131, 134 (1956) ("if the evidence justified it"), quoted on 48 U.S.L.W.

at 4804 n. 11; Stevenson v. United States, 162 U.S. 313, 323 (1896) ("if there be any evidence fairly tending to bear upon the issue"), quoted on 48 U.S.L.W. at 4803-4804 n. 11; Jackson v. State, 337 So.2d 1242, 1255 (Miss. 1976) (not "indiscriminately or automatically," but only when "warranted by the evidence"), summarized on 48 U.S.L.W. at 4803 n. 10.

Any extension of Beck to mandate lesser included offense instructions even when there was no evidentiary basis for them at trial would not only conflict with all those precedents but would also be contrary to the holding in Gregg v. Georgia, 428 U.S. 153 (1976). In Gregg, this Court upheld Georgia's capital punishment statute which provides that lesser included offense instructions shall be given only when there is evidence to support them. 428 U.S. at 160, 161 n. 2 (joint opinion); id., at 215-216 (concurring opinion of White, J., joined by Burger, C.J., and Rehnquist, J.). This long line of precedents should not be overturned without full briefing and argument, and this is especially true in light of the confusion caused by a summary ruling on the merits in a past capital case. See, Roberts (Harry) v. Louisiana, 431 U.S. 633, 635 (1977) (per curiam); id., at 639 (concurring opinion of Blackmun, J., joined by White and Rehnquist, J.J.). At the very least, the conviction and sentence in this case should not be summarily reversed. If the judgment is not vacated and the case remanded to the Alabama Supreme Court for further consideration in light of the Beck decision, then full briefing and argument on the merits should be ordered.

REASONS WHY THE WRIT SHOULD BE DENIED AS TO THE NON-BECK ISSUES RAISED IN THE PETITION

1. The Non-Beck Issues Set Out in the Petition Were Not Presented to or Decided by the Alabama Appellate Courts.

The petitioner argues that the Code of Alabama 1975, § 13-11-6(8) aggravating circumstance that the capital felony was "especially heinous, atrocious or cruel" is unconstitutional.

Petitioner also argues that it is unconstitutional to find and consider the § 13-11-6(4) aggravating circumstance that the capital felony was committed during a robbery in a case in which the defendant was convicted of the § 13-11-2(a)(2) capital offense of robbery-intentional killing. Petition for Writ of Certiorari at 6-7. The short answer to both of these arguments is that petitioner did not raise them either at trial or in the Alabama appellate courts. While petitioner did unsuccessfully challenge in the Alabama appellate courts the constitutionality of the statutory provision precluding lesser included offenses, he made no challenge to the two sentencing provisions which he now mentions for the first time. When a state appellate court fails to pass on a particular federal question, this Court should presume that it was due to the want of proper presentation, unless the aggrieved party can show to the contrary. Fuller v. Oregon, 417 U.S. 40, 50 n. 11 (1974); Street v. New York, 394 U.S. 576, 582 (1969).

Because petitioner did not present the § 13-11-6(4) and § 13-11-6(8) issues to the courts below, this Court need not decide them, Beck v. Alabama, supra, 48 U.S.L.W. at 4803 n. 8 (majority opinion), Moore v. Illinois, 408 U.S. 786, 799 (1972), should not decide them, Fuller v. Oregon, 417 U.S. 40, 50 n. 11 (1974), and has no jurisdiction to decide them. Beck v. Alabama, supra, 48 U.S.L.W. at 4807 (dissenting opinion of Rehnquist, J., joined by White, J.); Street v. New York, 394 U.S. 576, 581-582 (1969); Bailey v. Anderson, 326 U.S. 203, 206-207 (1945); see, 28 U.S.C. § 1257 (2) and (3).

2. There is No Merit in Petitioner's Contention That Code of Alabama 1975, § 13-11-6(8) Is Unconstitutional.

Alternatively, the writ should be denied insofar as it challenges the two statutory sentencing provisions because the challenges are without merit. The Code of Alabama 1975, § 13-11-6(8) aggravating circumstance that "[t]he capital felony was especially heinous, atrocious and cruel" is identical with the eighth aggravating circumstance of the Florida statute which was upheld in Proffitt v. Florida,

428 U.S. 242, 248 n. 6 (1976). Not only is the statutory language the same, but Alabama's appellate courts have adopted the construction placed upon it by the Florida Supreme Court in State v. Dixon, 283 So.2d 1, 9 (1973), see Jacobs v. State, 361 So.2d 607, 633 (Ala. Cr. App. 1977), aff'd 361 So.2d 640 (Ala. 1978), cert. denied, 439 U.S. 1122 (1979), and that construction has been expressly approved by this Court. See, Proffitt v. Florida, 428 U.S. 242, 255-256 (1976) (joint opinion).

3. There is No Merit in Petitioner's Contention That It is Unconstitutional for a Trial Judge To Find and Consider the Code of Alabama 1975, § 13-11-6(4) Aggravating Circumstance in a § 13-11-2(a)(2) Capital Case.

Nor is there any merit in petitioner's argument that it is unconstitutional for a trial judge as the sentencing authority to find and consider the § 13-11-6(4) aggravating circumstance that the capital felony was committed during a robbery in a case in which the defendant has been convicted of the § 13-11-2(a)(2) capital offense of robbery-intentional killing. The § 13-11-6(4) aggravating circumstance is virtually identical to the fourth aggravating circumstance of the Florida statute, see, Proffitt v. Florida, 428 U.S. at 249 n. 6, the only difference being that Alabama's provision is slightly more narrow.

The reason the so-called "overlap" issue arises under Alabama's statute but not under Florida's statute is that the definition of the underlying capital offenses is significantly more narrow in Alabama. Compare, Code of Alabama 1975, § 13-11-2(a), with Fla. Stat. Ann., § 782.04 (Supp. 1976-1977), as quoted in Proffitt v. Florida, 428 U.S. at 247 n. 4. Whereas all premeditated unlawful killings are capital felonies in Florida, Alabama's statute excludes from the definition of capital offenses domestic killings and killings where intent is supplied by the felony murder rule.

In place of Florida's broad definition of capital offenses, Alabama limits capital offenses to narrowly prescribed circumstances, one of which is a robbery during which the victim was intentionally killed by the defendant. Only because of Alabama's laudable attempt to narrow the definition of capital offenses, see, Gregg v. Georgia, 428 U.S. 153, 222 (1976) (concurring opinion of White, J., joined by Burger, C.J., and Rehnquist, J.), can the petitioner complain of any "overlap" between the definitions and the aggravating circumstances. Such an "overlap" does not offend the Constitution, because exactly the same result would have been achieved had Alabama done as Florida did and defined as capital all intentional killings. If Alabama had done that, petitioner would have been convicted of the capital offense of intentionally killing another human being, and he then would have been sentenced to death based on a finding of the same three aggravating circumstances that were found in this case.

In any event, it is not unconstitutional to find and consider the § 13-11-6(4) aggravating circumstance in a § 13-11-2(a)(2) capital offense case, because such a finding amounts to nothing more than consideration of the nature of the crime in the determination of the sentence. To hold that such a consideration is improper would be to turn back the clock on one of the most enlightened developments in Anglo-American sentencing practices — making the sentence fit the crime. The sentence cannot properly fit the crime unless the crime can be considered in determining the sentence, which is what the "overlap" of § 13-11-2(a)(2) and § 13-11-6(4) accomplishes.

CONCLUSION

For these reasons, the petition insofar as it raises issues related to Beck v. Alabama, 437 U.S. ___, 48 U.S.L.W. 4801 (June 20, 1980), should be granted, the judgment below vacated, and the case remanded to the Alabama Supreme Court for further consideration in light of the Beck decision. Alternatively, the petition should be denied insofar as it raises issues not related to Beck, and the remainder of the petition granted with full briefing and argument ordered on the issue of whether the present case is distinguishable from the Beck case.

Respectfully submitted,

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